IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34960

STATE OF IDAHO,	)	**2009 Unpublished Opinion No. 516**
	)	
Plaintiff-Respondent,	)	**Filed: June 25, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
MARCUS LANDON,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Jon J. Shindurling, District Judge.

Judgment of conviction and unified twenty-year sentence with three years determinate for sexual abuse of a minor, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

LANSING, Chief Judge

Marcus Landon appeals from the judgment of conviction entered upon his plea of guilty to sexual abuse of a minor. He alleges several errors in relation to his sentence.[1]

I.
BACKGROUND

Pursuant to a plea agreement, Landon pleaded guilty to sexual abuse of a child under the age of sixteen years, Idaho Code § 18-1506(1)(b), admitting sexual misconduct with a thirteen-year-old girl. The district court ordered a presentence investigation (PSI), which was filed with

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[1] In addition to the claims of error addressed in this opinion, Landon initially alleged, as a claim of fundamental error, that the prosecutor's statements at the sentencing hearing constituted a breach of the plea agreement. In his reply brief, Landon withdrew this issue in light of the United States Supreme Court's recent decision in *Puckett v. United States*, ___ U.S. ___, ___, 129 S.Ct. 1423, 1429-31 (2009).

the court on April 5, 2007, and was amended through two addenda. The first addendum was filed on April 11, 2007, and the second was filed on October 15, 2007. Landon's sentencing hearing took place on December 13, 2007, two months after the second addendum was filed. At the sentencing hearing, and without objection from Landon, the victim's mother made an oral statement that was proffered as a victim impact statement. The court also received a written victim impact statement from the minor victim. The mother's oral remarks included allegations of bad acts that Landon had allegedly committed during the time since the charged offense, and the written statement from the victim made some of the same allegations. Several of the alleged bad acts mentioned in the statements had also been previously mentioned, albeit in more general terms, in the PSI and the PSI addenda.

The district court sentenced Landon to a unified term of twenty years, with three years determinate. Landon thereafter filed an Idaho Criminal Rule 35 motion for reduction of his sentence, which the district court denied. Landon now appeals, asserting that it was fundamental error for the trial court to allow several components of the mother's statement at the sentencing hearing, that the court assumed facts not in evidence, and that the court imposed an excessive sentence.

II.
ANALYSIS

A. Mother's Victim Impact Statement

Landon complains of the mother's assertions that: 1) Landon had approached the victim's friends to solicit their testimony in his trial, 2) Landon had approached the victim's family members to solicit their assistance and testimony in his trial, 3) Landon had violated a no-contact order entered against him by staying with members of the victim's immediate family and had made related misrepresentations about the contents of the no-contact order, 4) Landon violated the no-contact order by frequenting a location next to the victim's babysitter's home knowing the victim would be there, 5) Landon had attempted to contact the victim upon seeing her at the babysitter's by waving, smiling and whistling at her, 6) Landon had represented to other people that the victim's mother was willing to drop the charges against Landon in exchange for money, and 7) Landon had committed an unspecified "violent act against women." Landon asserts that these allegations were admitted wrongfully both because they exceeded the permissible scope of a victim impact statement and because the lack of disclosure of these

allegations prior to the sentencing hearing violated his right to due process by depriving him of adequate notice and opportunity to rebut the accusations.

Landon did not object below to any of the mother's statements. This is significant because an issue generally may not be raised for the first time on appeal. *State v. Yakovac*, 145 Idaho 437, 442, 180 P.3d 476, 481 (2008); *State v. Sharp*, 101 Idaho 498, 503, 616 P.2d 1034, 1039 (1980); *State v. Gonzales*, 144 Idaho 775, 779, 171 P.3d 266, 270 (Ct. App. 2007). Review is permissible for the first time on appeal, however, if the alleged error constitutes fundamental error. *State v. Andersen*, 144 Idaho 743, 748, 170 P.3d 886, 891 (2007); *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971); *State v. Lenon*, 143 Idaho 415, 417, 146 P.3d 681, 683 (Ct. App. 2005). The Idaho Supreme Court has said that for an error to be fundamental, it must "be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *State v. Christiansen*, 144 Idaho 463, 470, 163 P.3d 1175, 1182 (2007) (quoting *State v. Bingham*, 116 Idaho 415, 423, 776 P.2d 424, 432 (1989)).

We are not persuaded by Landon's assertion that the admission of the mother's statements, though not objected to below, is reviewable on appeal as fundamental error. First, as to the permissible scope of a victim impact statement, we question whether the opinion Landon cites for his argument, *State v. Payne*, 146 Idaho 548, ___, 199 P.3d 123, 148 (2008), applies to situations other than death penalty cases.[2] Even if *Payne* does apply and the mother's statement exceeded the permissible scope of an unsworn victim impact statement, we nevertheless conclude that such error was not so egregious as to go to the foundation or basis of Landon's rights, *Yakovac*, 145 Idaho at 442, 180 P.3d at 481; *State v. Kenner*, 121 Idaho 594, 597, 826 P.2d 1306, 1309 (1992); *Mintun v. State*, 144 Idaho 656, 661, 168 P.3d 40, 45 (Ct. App. 2007), to so profoundly distort the proceeding as to produce manifest injustice and deprive Landon of due process, *State v. Doe*, 144 Idaho 534, 536, 164 P.3d 814, 816 (2007); *State v. Sheahan*, 139 Idaho 267, 281, 77 P.3d 956, 970 (2003), *State v. Perry*, 144 Idaho 665, 669, 168 P.3d 49, 53 (Ct. App. 2007), or to otherwise constitute a fundamental error. While the district court did discuss some of the mother's allegations at

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[2] *Payne* states that the scope of victim impact statements is limited to "[describing] the characteristics of the victim and the emotional impact of the crime on the family; and . . . [setting] forth the family members' opinions and characterizations of the crime and the defendant," *Payne*, 146 Idaho at ___, 199 P.3d at 148 (citing *Booth v. Maryland*, 482 U.S. 496, 502 (1987) while discussing victim impact statements within the context of a capital case).

sentencing, the court also explicitly said that it did not "put much weight on [them]," and we cannot say that any statements made beyond the permissible scope of comment so infected the process as to constitute fundamental error.

We similarly find Landon's due process argument unable to clear the hurdle of fundamental error. First, it is inaccurate to say that Landon had absolutely no notice of the mother's allegations of misconduct. Many of the complained-of allegations had already been asserted, at least in general terms, in the presentence investigation and its subsequent addenda, which had been submitted two months or more before the sentencing hearing. Landon thus had an opportunity to address them with rebuttal evidence if such evidence was available. Second, when the victim's mother made her statement, Landon could have asked for a continuance to allow him time to research and repudiate her allegations or asked to question the mother regarding her allegations, among other things. He was not prevented from responding to her accusations, but chose not to do so. Consequently, even assuming it was error for the court to permit the mother's allegations, we simply do not see such error as having so profoundly distorted the trial process as to deprive Landon of his right to due process.

Since Landon did not object below to the mother's allegations and since he has not shown fundamental error in the court's having allowed them, we do not consider his assertion of error for the first time on appeal.

B. Landon's Sentence

1. Fact-finding by the district court

Landon asserts that the district court made a finding of fact unsupported by substantial competent evidence and thereby abused its discretion at sentencing. In the challenged statement, the court said:

> And I want you to understand that with sex offenders, my concern looks forward in many years. Because the profile we have of a typical criminal is that by the time they get your age or a little older than you, the desire to engage in that type of antisocial activity starts to wane, and pretty soon you start saying, "Oh, I've got to live a better life than this, because it's too hard doing this."
>
> Sex offenders, when you have an interest, like you do, in adolescent girls, all that does as you get older is intensify unless you've got treatment, unless you've got some sort of intervention. And so I worry about how things go down the road.

While we do not encourage sentencing courts to make such statements or consider such factors without also elucidating a more complete basis for their assertion, we note that "trial judges are

vested with sentencing discretion so that they can apply their own judgment *and experience* to the task of independently sentencing each defendant that comes before them." *Stedtfeld v. State*, 114 Idaho 273, 277, 755 P.2d 1311, 1315 (Ct. App. 1988) (emphasis added). With that in mind, it appears that the district judge here was simply bringing to bear his accumulated knowledge, judicial experience and background in fashioning an appropriate sentence. Moreover, the challenged comment is largely supported by the psychosexual evaluation report in which the evaluator opined that Landon presented a moderate risk to sexually recidivate but that this risk could be reduced by sexual offender treatment. For these reasons, we do not deem the court's comment to constitute reversible error.

2. Length of Landon's sentence

Landon also asserts that his unified sentence of twenty years with three years determinate is excessive and thus constitutes an abuse of the district court's discretion. When a sentence is challenged on appeal, we examine the record, focusing upon the nature of the offense and the character of the offender, to determine if there has been an abuse of the sentencing court's discretion. *State v. Young*, 119 Idaho 510, 511, 808 P.2d 429, 430 (Ct. App. 1991). The defendant bears the burden to show that the sentence is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007). An abuse of discretion will be found only if, in light of the governing criteria, the sentence is excessive under any reasonable view of the facts. *State v. Charboneau*, 124 Idaho 497, 500, 861 P.2d 67, 70 (1993). Where reasonable minds might differ as to the length of the sentence, we will not substitute our view for that of the district court. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992); *State v. Admyers*, 122 Idaho 107, 108, 831 P.2d 949, 950 (Ct. App. 1992). We have examined the record and have specifically reviewed and considered the mitigating factors that Landon enumerates on appeal. Applying the above standards, we conclude that the district court did not abuse its discretion in fashioning Landon's sentence.

III.

CONCLUSION

The errors Landon alleges were either not preserved for consideration on appeal or did not constitute reversible error. The judgment of conviction and sentence are therefore affirmed.

Judge PERRY and Judge GUTIERREZ **CONCUR.**